Office-Supreme Court, U.S.
FILED
MAY 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 961

CHARLES CHRISTOPHER CAMPBELL, CHARLES WILLIAM LANG and THELMA ADELE ENSOR,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

STANFORD SHMUKLER,
1325 Spruce Street,
Philadelphia 7, Pennsylvania.
LEON H. KLINE,
1201 Philadelphia Saving Fund Bldg.,
Philadelphia 7, Pennsylvania.
MARTIN VINIKOOR,
VINIKOOR, FEIN, CRIDEN AND JOHANSON,
605 Finance Building,
1428 South Penn Square,
Philadelphia 2, Pennsylvania.
Counsel for Petitioners.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
ARGUMENT	9
1. Petitioners Were Deprived of Due Process of Law in That the Trial Court Under Then Existing Pennsylvania Law, Which Admitted Illegally Seized Evidence, Prevented Petitioners From Attacking the Illegality of a Search Warrant, and the Pennsylvania Appellate Court, Even After Mapp v. Ohio, Refused a New Trial or Hearing on This Issue	9
2. Petitioners Were Deprived of Due Process of Law in Being Convicted Without Any Evidence of Their Guilt of the Crimes Charged	12
A. Failure to Produce Victims of Alleged Crime	12
B. Failure of the Evidence to Implicate Appellants Lang and Ensor	16
CONCLUSION	19
APPENDIX A—Order of Supreme Court of Pennsylvania on Petition for Allowance of Appeal	21
APPENDIX B—Opinion of Superior Court of Pennsylvania	22
APPENDIX C—Opinion and Order of the Court of Oyer and Terminer of York County	32

TABLE OF CASES CITED.

	Page
Barry v. United States, 287 F. 2d 340 (D. C. Cir. 1961)	18
Cole v. Arkansas, 333 U. S. 196 (1948)	13
Commonwealth v. Dolph, 164 Pa. Super. 415, 65 A. 2d 253 (1949)	16
Commonwealth v. Gambrone, 183 Pa. Super. 283, 130 A. 2d 254 (1957)	9
Commonwealth v. Giovanetti, 341 Pa. 345, 19 A. 2d 119 (1941)	18
Commonwealth v. Spofford, — Mass. —, 180 N. E. 2d 673 (1962)	11
Commonwealth v. Thomas, 357 Pa. 68, 53 A. 2d 112 (1947)	18
Garner v. Louisiana, — U. S. —, 7 L. ed. 2d 207 (1961)	8, 13,
Griffin v. Illinois, 351 U. S. 12 (1956)	11
Hall v. Warden, Maryland Penitentiary, 201 F. Supp. 639 (D. Md. 1962)	11
Mapp v. Ohio, 367 U. S. 643 (1961)	2, 6, 8, 9, 10, 11, 12
People v. Loria, 223 N. Y. S. 2d 462 (1961)	11
Shorey v. Maryland, — Md. —, 177 A. 2d 245 (1962)	12
State v. Valentin, — N. J. S. —, 174 A. 2d 737 (1961)	11
Stirone v. United States, 361 U. S. 212 (1960)	16
Thompson v. Louisville, 362 U. S. 199 (1960)	8, 13
United States v. Carabasi, 292 F. 2d 362 (3d Cir. 1961)	16
United States v. Currens, 290 F. 2d 751 (3d Cir. 1961)	18

STATUTES CITED.

	Page
Pennsylvania Penal Code, Pa. Stat. Ann. tit. 18, § 4718	3
28 U. S. C. § 1257(3)	2
U. S. Constitution, Fourth Amendment	3
U. S. Constitution, Fourteenth Amendment	3

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No.

CHARLES CHRISTOPHER CAMPBELL, CHARLES WILLIAM LANG AND THELMA ADELE ENSOR,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Charles Christopher Campbell, Charles William Lang and Thelma Adele Ensor, your petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above case on February 13, 1962.

OPINIONS BELOW.

The order of the Supreme Court of Pennsylvania denying allocatur (Appendix A, *infra*, p. 21) has not been officially reported. The opinion of the Superior Court of Pennsylvania (Appendix B, *infra*, p. 22) was reported in 196 Pa. Super. 386, 175 A. 2d 324 (1961). The opinion and order (Appendix C, *infra*, p. 32) of the York County Court have not been officially reported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania denying allocatur (Appendix A, *infra*, p. 21), was entered on February 13, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Where the trial court, under Pennsylvania law prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), prevented petitioners from developing the lack of probable cause for issuing the search warrant which was the basis of the arrest of the petitioners and of the seizure of evidence which led to their conviction, and where the Pennsylvania Superior Court, though recognizing that *Mapp* changed the Pennsylvania law, refused to grant a new trial because of the failure of the record to show illegality in issuing the warrant, were petitioners deprived of due process guaranteed by the Fourteenth Amendment?

2. Whether petitioners were deprived of due process of law guaranteed by the Fourteenth Amendment in being convicted without any evidence of their guilt of the crimes with which they were charged.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

The Pennsylvania Penal Code provides in pertinent part:

> "§ 4718. *Abortion.*
>
> Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both." PA. STAT. ANN. tit. 18, § 4718.

STATEMENT OF THE CASE.

Each petitioner was charged in a separate bill of indictment filed in the Court of Oyer and Terminer of York County, October Sessions, 1958, Nos. 158, 159 and 160, each bill containing three counts. Typically, the first count in one bill of indictment charged petitioner Campbell with unlawfully administering to three women, Elizabeth Troyer, Hazel Romaine Reed and Nancy Lou Reese, supposed and believed to be pregnant and quick with child, a certain drug and substance, with intent to procure the miscarriage of the three above-named women; the second count charged petitioner Campbell with administering to the same three women a certain poison, drug and substance with intent to procure their miscarriages; and the third count charged petitioner Campbell with unlawfully using a certain instrument and means upon, about and within the bodies of the same three women with intent to procure their miscarriages (9a-11a).[1] Each of the other two bills of indictment charged each of the other petitioners with the same offenses in identical language (11a-15a).

After a trial lasting two and a half days, the jury found each petitioner not guilty on each of the first two counts, but convicted each petitioner on the third count of his or her respective bill of indictment. Timely motions for new trial and in arrest of judgment were filed by each petitioner and were refused by the Court. Petitioner Campbell was sentenced to 1½ to 5 years imprisonment, plus costs of prosecution; petitioner Lang was sentenced to imprisonment in the York County Jail for eight months and to pay the costs of prosecution; and petitioner Ensor was given an indefinite sentence of imprisonment.

A petition for new trial, setting forth information discovered by counsel for petitioners subsequent to the trial, was filed on May 15, 1961 by all three petitioners (249a-

1. References followed by an "a" are to the Record printed for the Superior Court of Pennsylvania.

250a), and was refused by the Court on the same day without a hearing. Timely appeals were taken to the Superior Court of Pennsylvania which affirmed the convictions of all defendants but remanded in the case of petitioner Lang for correction of the sentence to include a minimum term. A timely petition for reargument was denied by that Court. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania.

The facts developed at trial largely through the testimony of Pennsylvania State Police officers were as follows. On the evening of November 21, 1958, several officers of the Pennsylvania State Police, armed with a search warrant, stationed themselves near a farm in York County (30a). The State Police allegedly had obtained the warrant on the basis of a complaint made by the owner of the property, referred to throughout the trial as "Colonel Hinkley". The information for the complaint was sworn to by State Police Officer Robert Smith before Alderman Fickes, who issued the warrant (62a-63a). The warrant does not appear in the record, and it is not shown whether the warrant authorized a search in the nighttime or was restricted to the daytime, nor is the scope of the warrant disclosed.[2] After observing two cars stop outside the house and the passengers enter the house, at about 7:40 p.m. (70a) the State Police entered the house using a key previously obtained from the owner of the premises. In the house they found petitioner Campbell sitting on a stool beside an operating table dressed in a white gown and cap, wearing a white mask and rubber gloves. One of the officers entered a bathroom where he saw petitioner Ensor taking off a white uniform. He ordered her to button it up again, and later that evening had her change into street clothes and took her uniform. Another officer went into a living room in the house and found petitioner Lang sitting there in ordinary street clothes. Throughout the house the officers found various

2. In fact, there was a prior search warrant which was not executed (67a).

surgical instruments and medical items as well as normal household items. In several rooms of the house five women were found, two in beds, one sitting on a bed dressed in a slip and two others fully clad. Four of these women were taken to the office of Dr. Hart who examined them. One of the four, a Commonwealth witness, Barbara Perry, had consulted Dr. Hart as a private patient some time previously. At the trial Dr. Hart testified that there was no evidence of surgical procedure in the region of the reproductive organs of Barbara Perry nor on one of the other women he examined, but that there was such evidence as to the other two women he examined.

All of the petitioners were interrogated at the State Police Barracks that evening, and one of the officers testified that petitioner Campbell signed a written statement that he had performed surgical procedures upon three women for the purpose of inducing abortion (172a-179a). In the statement Campbell did not identify the three women upon whom he had performed these acts. Petitioner Ensor, in a verbal statement to another officer, said that she was employed by Campbell as a secretary for 15 years, had training as a practical nurse, and that her duties were to administer to the general needs of the women who came to the house (184a-185a). Petitioner Lang, also in a verbal statement to that officer, said that he was employed by Campbell to work on one of the latter's farms as a carpenter, and that he had been instructed to pick up and transport two women to the house in which he was arrested, using back country roads (185a-186a). He said that he did not know why the women were being brought to the house, and did not know that abortions were being performed, although he had heard that Campbell was supposed to perform abortions.

None of the three women named in the indictment as alleged victims appeared or testified at the trial. The Commonwealth offered evidence that subpoenas had been issued for them but two were not honored and the third could not be served because the witness could not be found (195a-

196a). No effort was made by the Commonwealth to compel the appearance of any of these three women under the Uniform Attendance of Witnesses Act. Only one of the other women found in the house, a Barbara Perry, testified; she testified only that she had gone to the house and received an injection in the leg from petitioner Ensor (109a-118a). Much of the paraphernalia taken from the house was offered in evidence as were photographs of three women who were identified by some of the witnesses as being three of the women found in the house on the night in question. Also, one of the officers had induced petitioner Campbell to put on a gown and mask and had taken his picture, which was also offered in evidence.

During the trial, which took place prior to the decision of this Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), defense counsel attempted to cross-examine the State Police officer upon whose complaint the search warrant was issued, to determine whether there was probable cause for issuance of the warrant. The trial judge ruled that defense counsel could not attack the search warrant, and permitted him to proceed with cross-examination only on the question of whether there was bias or prejudice (62a-69a).

After their conviction and denial of motions for new trial and in arrest of judgment, petitioners filed a petition for new trial alleging that the three women named in the indictment and who had not appeared at the trial, had given affidavits stating that none of the petitioners had committed any acts of abortion upon them, and the petition alleged willingness to take depositions of those witnesses at the cost of the petitioners (249a-250a). The petition also alleged that petitioners had learned that Colonel Hinkley was not in the jurisdiction of the court at the time that the alleged complaint which was the basis of the search warrant had been made to the York Substation of the State Police. This petition was denied without a hearing (7a).

REASONS FOR GRANTING THE WRIT.

At the trial of this case, which took place prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), the trial court applied existing Pennsylvania law, which admitted illegally obtained evidence, in ruling that defense counsel could not inquire into the question of whether probable cause existed for issuing a search warrant which was the basis for the arrest of the petitioners and the seizure of evidence which led to their convictions. On appeal, after the *Mapp* decision had been announced, the Pennsylvania Superior Court concluded that although the decision of this Court in *Mapp* changed Pennsylvania law, it was inapplicable since no illegality in obtaining the search warrant was shown. However, it is apparent from the record that defense counsel's attempt to show illegality was blocked by the ruling of the trial court, which was proper under existing law but which has now been changed by this Court's decision in *Mapp*. This case thus presents the question of whether the appellate court's decision here conflicts with or improperly evades this Court's decision in *Mapp*, and thus denies petitioners due process guaranteed by the Fourteenth Amendment. Appellate courts in other states have reached different conclusions in passing on this question, which is of paramount importance in the application of the constitutional protection accorded by the *Mapp* interpretation and in the administration of justice in the state courts. This Court should, accordingly, grant certiorari to settle this conflict.

Additionally on two recent occasions this Court has emphasized that it is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. Louisville*, 362 U. S. 199, 206 (1960); *Garner v. Louisiana*, — U. S. —, 7 L. ed. 2d 207, 213 (1961). In the case at bar, the state courts have sustained convictions of three individuals without the slightest shred of evidence of their guilt of the specific crime charged. Accordingly, this Court should grant certiorari to prevent a gross miscarriage of justice.

ARGUMENT.

1. Petitioners Were Deprived of Due Process of Law in That the Trial Court, Under Then Existing Pennsylvania Law, Which Admitted Illegally Seized Evidence, Prevented Petitioners From Attacking the Illegality of a Search Warrant, and the Pennsylvania Appellate Court, Even after *Mapp v. Ohio*, Refused a New Trial or Hearing on This Issue.

The case at bar was tried in October, 1960, eight months prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), in which this Court held that evidence obtained by unreasonable search and seizure in violation of the Fourth Amendment, made applicable to the States through the due process clause of the Fourteenth Amendment, is inadmissible in a state court. Prior to this decision in Pennsylvania evidence obtained in violation of an individual's constitutional rights could have been admitted in evidence against him. The trial court so concluded (259a), citing *Commonwealth v. Gambrone*, 183 Pa. Super. 283, 130 A. 2d 254 (1957). The Superior Court specifically agreed, and also specifically noted that *Mapp* changed Pennsylvania law in this respect (Appendix B, *infra*, 25).

Despite the Pennsylvania law at the time of the trial, defense counsel did attempt to cross-examine the State Police officer who had applied for and obtained a search warrant for the premises, pursuant to which the State Police entered the premises, arrested petitioners, and obtained evidence and statements which were introduced at the trial and which led to the convictions of petitioners. Defense counsel futilely attempted to determine whether probable cause existed for the issuance of the warrant. Counsel was prevented by the ruling of the trial court from pursuing this line of questioning, and was restricted to cross-examining the officer to determine his bias or prejudice (62a-69a).

The issue of the validity of the warrant was again raised by counsel in the motion for new trial but was rejected on the basis of Pennsylvania law at that time, which was still prior to the *Mapp* decision (259a). After sentence and before the appeal was argued, this Court decided *Mapp;* counsel again raised the issue on appeal. The Pennsylvania Superior Court simply concluded that the *Mapp* decision was inapplicable since defense counsel had failed to show illegality in issuing the search warrant (Appendix B, *infra*, 26).

It is quite apparent that the failure of proof relied upon by the Superior Court resulted solely from the ruling of the trial court—which may have been correct at that time, but which became incorrect prior to completion of the appeal because of the *Mapp* decision. Although there had been no motion to suppress the evidence filed before trial, such a motion would have been futile under then existing Pennsylvania law, as recognized by the trial court and Superior Court. Even under that state of the law, defense counsel attempted to develop by cross-examination that the State Police officer who had obtained the search warrant had not even talked to the owner of the premises, Colonel Hinkley, who had allegedly made the complaint upon which the warrant was based (63a-64a); he was prevented from doing so by the trial court's ruling. This is rendered even more significant by the allegation in the motion for new trial filed after the trial (still prior to *Mapp*) and denied by the trial court without hearing, that Colonel Hinkley was not even in the jurisdiction at the time that the alleged complaint had been made to the State Police (250a). This allegation alone could be interpreted as a showing of illegality; at any rate, the failure to develop it further can not be charged to any fault of petitioners, but to the rulings of the trial court.

This court has not yet announced whether the *Mapp* decision is to have retrospective effect. It seems clear that the *Mapp* decision was not a change in organic law to be

applied only prospectively; it was an interpretation of the constitutional provision which reads the same after the *Mapp* decision as it did before. Thus, while the trial court may have correctly applied the state law as interpreted at the time of the trial, the *Mapp* decision declares that the state courts' interpretation was wrong. In the case at bar, the state appellate courts had the opportunity to correct such mistake prior to the final decision in the pending case. This Court certainly can still correct that mistake to prevent a manifest injustice. *Cf. Griffin v. Illinois*, 351 U. S. 12 (1956).

In the case at bar there is no collateral attack on a conviction after the judgment has been affirmed, as was the situation in *Hall v. Warden, Maryland Penitentiary*, 201 F. F. Supp. 639 (D. Md. 1962) (federal habeas corpus proceeding). On the contrary, this Court is being asked to review the refusal of the state appellate courts to apply the *Mapp* doctrine to a case in which the judgment has not yet become final. The majority of the Court of Appeals of New York decided that the *Mapp* rule is to be applied in its review of pending appeals from pre-*Mapp* convictions. *People v. Loria*, 223 N. Y. S. 2d 462 (1961), where *Mapp* was decided after an intermediate appellate court had sustained the conviction, and the Court of Appeals still reversed. In *Commonwealth v. Spofford* — Mass. —, 180 N. E. 2d 673 (1962), the Supreme Judicial Court of Massachusetts unanimously came to the same conclusion. Also see *State v. Valentin*, — N. J. S. —, 174 A. 2d 737 (1961), where the New Jersey court came to a similar conclusion.

In *Spofford*, the court reversed the conviction and granted judgment for the defendants because the record showed the search and seizure to be unreasonable. In *Loria*, where the record demonstrated that the search and seizure had been made without a warrant the New York court granted a new trial but expressly reserved to the People the right to establish the propriety of the entry into the house in question. Similarly, in *Valentin* where the New Jersey court could not determine from the record whether

the search and seizure were reasonable, the matter was returned to the lower court. In the case at bar, the least that should have been done to comply with the mandate of this Court in *Mapp* is to have returned the matter to the trial court for a new trial or hearing at which the validity of the search warrant could be determined. Distinguishable is *Shorey v. Maryland*, — Md. —, 177 A. 2d 245 (1962), where the Maryland court sustained a pre-*Mapp* conviction on the ground that no objection had been made at the trial to the arrest of defendant nor to the use of the evidence obtained pursuant thereto.

Accordingly, this Court should grant certiorari to review the Pennsylvania Superior Court's decision, and the Pennsylvania Supreme Court's acquiescence therein, which conflicts with and evades this Court's decision in *Mapp*, and to establish a guide-post for state courts in the application of that decision.

2. Petitioners Were Deprived of Due Process of Law in Being Convicted Without Any Evidence of Their Guilt of the Crimes Charged.

A. Failure to Produce Victims of Alleged Crime.

All three petitioners were identically charged with committing acts of abortion on three named women—Elizabeth Troyer, Nancy Lou Reese and Hazel Romaine Reed. At the trial, the Commonwealth's evidence showed that five women had been found in the farm house. Only one of these, Barbara Perry, appeared at the trial and was identified by the other witnesses as having been at the farm house, as she admitted in her own testimony. However, she was unable to identify any of the other women who had been at the farm house. Only four of the women, including the witness Barbara Perry, had been taken to Dr. Hart for physical examination after the raid. His examination showed that as to only two of the women—not including Barbara Perry—was there any evidence of the insertion of tampons or surgical procedures in their reproductive areas. There was

no evidence of such insertions or surgery on Barbara Perry nor on one of the other women.

To sustain the convictions under the indictments as drawn, it was vital for the Commonwealth to prove two elements: that acts of abortion had taken place, and that those acts had been committed *on the persons named* in the indictment. It would not be sufficient to show that acts of abortion had been committed on persons other than those named in the indictment—it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction. *Garner v. Louisiana*, 7 L. ed. 2d at 214; *Thompson v. Louisville*, 362 U. S. 199, 206 and cases cited at footnote 13; *cf. Cole v. Arkansas*, 333 U. S. 196 (1948).

Here the Commonwealth totally failed to produce any evidence that the acts of abortion were committed on the persons named in the indictment. The Commonwealth totally failed to prove that the two women who, according to Dr. Hart showed signs of have been subjected to abortion attempts, were two of the persons named in the indictment.

There was no direct evidence of acts of abortion committed on any individual. No one testified that they had observed any of the petitioners insert any tampons nor perform any surgery upon any woman. Nor did any of the women named in the indictment appear and testify that any act of abortion had been committed upon them.[3] The Commonwealth attempted to prove its case solely by circumstantial evidence. It offered the testimony of police officers that they had found five women in the farmhouse, and had taken four of them to Dr. Hart for examination. Dr. Hart testified that two of them (Nancy Reese and Ann Troyer) showed evidence of having been subjected to surgical procedures in the reproductive area, although as to the

3. In fact, the motion for new trial on the basis of after-discovered evidence alleges that affidavits had been obtained from those persons named in the indictment swearing that no acts of abortion had been committed upon them by these petitioners (249a).

other two (Barbara Perry and Hazel Reed) he testified that in his opinion no act of abortion had been performed. However, Dr. Hart did not know any of these individuals personally; the only evidence offered tending to show that the women examined by Dr. Hart were those designated in the indictment was his hearsay testimony that the women had identified themselves by the names designated in the indictment, and Dr. Hart's identification of pictures of the women he had treated. There was no showing that these were their true names nor that the women whose pictures he identified were the women named in the indictment.

At the trial the Commonwealth attempted to explain its failure to produce these women by showing that subpoenas had been issued for all three; Troyer and Reed were served in Baltimore, but Reese could not be found (195a-196a). However, no attempt was made to force their attendance under the Uniform Subpoena of Witnesses Act. In addition, these women had been held by Alderman Fickes under $1,000.00 bail each but there was no showing of any attempt to procure their attendance under these bonds.

At the close of the trial defense counsel requested that the trial court charge the jury that failure of the Commonwealth to produce the alleged victims or to adequately explain their failure to do so gives rise to an inference that their testimony would be unfavorable to the Commonwealth. The Court so charged as to the failure of the Commonwealth to produce or explain the absence of two of the women, Reed (upon whom admittedly no abortion was committed) and Troyer. However, the court told the jury that the rule would have no application as to Reese, since the court concluded that there had been an unsuccessful attempt to locate her. What would ordinarily be an evidentiary ruling, not of the type this Court would normally review, nonetheless had far-reaching due process implications, since defense counsel later obtained from all three women affidavits that none of the appellants had ever committed acts of abortion upon any of them. This was set out in the motion for

new trial filed by defense counsel and denied without a hearing at the time of sentencing. The failure of the Commonwealth to call these witnesses thus deprived petitioners of an opportunity to develop this at trial.

There can be no disputing the proposition of law, suggested by the prosecution and relied upon by the Pennsylvania Superior Court, that the Commonwealth is under no duty to call all of the eyewitnesses to a crime, particularly where the district attorney may have reason to believe that such eyewitnesses are unreliable. However, in the case at bar, the women named in the indictment and upon whom the acts of abortion are alleged to have been performed were the *only* eyewitnesses to the alleged crime—and their affidavits say that there was no crime committed upon them. This is thus not a situation where the eyewitnesses are expected by the Commonwealth to be unreliable—here the eyewitnesses, the victims of the alleged crime, would prove that no crime had been committed. Accordingly, the failure of the Commonwealth to produce these individuals named in the indictment as victims not only amounted to a suppression of evidence favorable to the defense, but left the record devoid of *any* competent evidence of the alleged crime.

The alleged admissions of the petitioners did not supply the missing evidence. In a written statement offered into evidence by the Commonwealth, petitioner Campbell allegedly admitted performing a "D and C;" dilating the cervix and scraping the uterus, for the purpose of an abortion, on three women. However, in that statement petitioner did not—nor was he asked to—identify the women upon whom he admitted performing the acts. There is absolutely no proof offered in the case to show that the women upon whom he allegedly had admitted committing the acts were the three named in the indictment. In fact, the Commonwealth's own evidence compels a different conclusion—since the evidence shows that there were only two women upon whom any acts of abortion could have been committed. Thus, the prosecution itself contradicted the

alleged admissions to be unreliable. Furthermore, the affidavits of the three women named in the indictment offered in the motion for new trial demonstrate the alleged admissions to be inapplicable to them. Nor do the alleged oral statements of petitioners Lang and Ensor supply proof of acts of abortion on the three named individuals.

Furthermore, it is too elementary for citation that a confession is not admissible without proof of the corpus delicti. See *Commonwealth v. Dolph*, 164 Pa. Super. 415, 65 A. 2d 253 (1949), and cases cited therein. Here, without any direct evidence that any acts of abortion had been committed upon the women named in the indictment or, for that matter, upon any other women, petitioner's alleged confession cannot supply that element of the corpus delicti. Petitioner Campbell's alleged confession may give rise to a belief that he had committed some crime; however, it does not show that he committed the specific crime charged in the indictment. The requirements of due process will not permit a conviction to stand on the basis of evidence which does not support the charge in the indictment, even if the evidence shows the existence of another crime not charged in the indictment. See *Stirone v. United States*, 361 U. S. 212 (1960); *United States v. Carabasi*, 292 F. 2d 362 (3d Cir. 1961).

Accordingly, these petitioners have been convicted without the slightest proof of their guilt of the crime charged, and this Court should grant certiorari in order to prevent a manifest injustice and denial of due process.

B. Failure of the Evidence to Implicate Appellants Lang and Ensor.

Petitioners Lang and Ensor were charged, identically with petitioner Campbell, with wielding the instrument or means utilized for procuring the miscarriages. But there was absolutely no evidence—and the Commonwealth did not contend—that petitioners Lang or Ensor had themselves performed any operation or performed any acts of

abortion. The only evidence offered against Lang was that he had been employed by Campbell for three and a half years as a carpenter on one of the latter's farms, and that he had been instructed by Campbell to pick upon and transport two women to the house where the arrests were made, using back country roads. The record is devoid of any evidence that the women he transported were the ones named in the indictment; in fact, there is evidence that one of the two was Barbara Perry, not named in the indictment and upon whom admittedly no abortion was performed. Lang's alleged admission that, although he did not know that there were abortions being performed, he had heard that Campbell performed abortions cannot supply the proof necessary to sustain the charge against him. Not only were the admissions inadmissible because of the failure of proof of corpus delicti, but they utterly failed to prove Lang's knowledge of and interest in the outcome.

Similarly, the only evidence offered against Ensor was that she had been employed by Campbell for many years, that she had training as a practical nurse, and that her duties were to administer to the general needs of the women who came to the farmhouse. Ensor's alleged admission that she administered to the needs of the women, and that she knew that Campbell performed acts designed to procure abortions, would likewise not supply the missing proof.

Since the prosecution did not attempt to show that these two petitioners performed the acts of abortion, nor were they charged with conspiracy,[4] Lang and Ensor could be convicted of the substantive offense only if they were aiders and abettors of the principal felon. It is too clear for extended citation that to be an aider and abettor there must be more than knowledge of the intended crime and criminal

4. It is obvious that petitioners could not be found guilty of the substantive offense of abortion if the proof were merely sufficient to show a conspiracy, as seems to have been the theory of the trial court set forth in its opinion sustaining the conviction of these two petitioners (260a).

intent: there must be advance notice of the scheme and approval of it; the accused must join in the commission of the crime and become an active partner in the intent which is the crime's basic element. See *Commonwealth v. Thomas*, 357 Pa. 68, 53 A. 2d 112, 114 (1947); *Commonwealth v. Giovangtti*, 341 Pa. 345, 354, 19 A. 2d 119, 123 (1941). Yet in the case at bar not only was there not an iota of evidence offered to show that Lang and Ensor knew of Campbell's plans or scheme, nor that they had any interest or stake in the outcome, the jury was not even instructed on the definition of aiding and abetting nor on the essential elements requisite for sustaining convictions under that theory. The trial judge gave to the jury no guide posts in determining whether these petitioners were guilty. As to Ensor, the Court charged only that if the jury believed that she administered to the needs of the girls, then she would be equally guilty with Campbell. Since she had admitted this, there was no doubt as to the jury's verdict. Yet there was no evidence to sustain her conviction. As to Lang, the Court instructed that if the jury should believe that he transported the women with knowledge that his act was a part and parcel of the whole operation, then he would be equally guilty. But again, there was no evidence to sustain his implication in the scheme.

It is respectfully submitted that the instructions fell far short of the trial judge's responsibility to instruct on the applicable law, so that it would constitute fundamental error, whether or not there was a request for proper instruction. See *United States v. Currens*, 290 F. 2d 751, 759 (3d Cir. 1961); *Barry v. United States*, 287 F. 2d 340, 341 (D. C. Cir. 1961). On the instruction as given a jury could find guilty a taxi driver with no interest or stake in the outcome merely if he knew the type of establishment to which he drove his passenger. On that charge the jury could also find guilty a doctor or nurse who might try to heal or help a woman upon whom they knew an abortion had been committed, even if they had not the slightest interest or stake

in the illegal operation and even if they heartily condemned such conduct. Such a result would be absurd. But in the case at bar, because of such instruction, the outcome was not in doubt even though there was not the slightest evidence offered to show that Lang and Ensor had any knowledge of or interest in the illegal operation. Accordingly, the Court should grant certiorari to determine whether these petitioners have been deprived of due process by conviction without a shred of evidence as to their guilt of the crimes with which they were charged.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant a writ of certiorari to review the due process objection and to settle a question of great importance to the administration of justice and the implementation of the constitutional interpretation of this Court.

Respectfully submitted,

STANFORD SHMUKLER,
1325 Spruce Street,
Philadelphia 7, Pa.,
LEON H. KLINE,
1201 Phila. Saving Fund Bldg.,
Philadelphia 7, Pa.,
MARTIN VINIKOOR,
VINIKOOR, FEIN, CRIDEN AND JOHANSEN,
605 Finance Bldg.,
1428 South Penn Square,
Philadelphia 2, Pa.,
Counsel for Petitioners.